Supreme Court, U. S.
FILED
DEC 16 1974
MICHAEL RODAK, JR., CLERK

No. 74-754

# In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

*v.*

ROY MANDUJANO

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**ROBERT H. BORK,**
*Solicitor General,*

**HENRY E. PETERSEN,**
*Assistant Attorney General,*

**ROBERT B. REICH,**
*Assistant to the Solicitor General,*

**PETER M. SHANNON, JR.,**
**JAMES HUNOLT,**
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Constitutional provision and statute involved | 2 |
| Statement | 3 |
| Reasons for granting the writ | 6 |
| Conclusion | 20 |
| Cases: | |
| *Blair* v. *United States*, 250 U.S. 273 | 12 |
| *Bryson* v. *United States*, 396 U.S. 64 | 18, 19 |
| *Commonwealth of Pennsylvania* v. *Columbia Investment Corp. et al.*, 325 A. 2d 289 | 8 |
| *Cargill* v. *United States*, 381 F. 2d 849, certiorari denied, 389 U.S. 1041 | 18 |
| *Counselman* v. *Hitchcock*, 142 U.S. 547 | 9 |
| *Escobedo* v. *Illinois*, 378 U.S. 478 | 14 |
| *Glickstein* v. *United States*, 222 U.S. 139 | 18 |
| *Harris* v. *New York*, 401 U.S. 222 | 18 |
| *Kastigar* v. *United States*, 406 U.S. 441 | 13 |
| *Kirby* v. *Illinois*, 406 U.S. 682 | 13 |
| *Michigan* v. *Tucker*, No. 73–482, decided June 10, 1974 | 10, 13 |
| *Miranda* v. *Arizona*, 384 U.S. 436 | 10, 12 |
| *Orozco* v. *Texas*, 394 U.S. 324 | 10 |
| *Schneckloth* v. *Bustamonte*, 412 U.S. 218 | 9 |
| *Sherman* v. *United States*, 356 U.S. 369 | 20 |
| *Sorrells* v. *United States*, 287 U.S. 435 | 20 |
| *Stanley* v. *United States*, 245 F. 2d 427 | 8 |
| *United States* v. *Calandra*, 414 U.S. 338 | 7, 13, 20 |
| *United States* v. *Corallo*, 413 F. 2d 1306, certiorari denied, 396 U.S. 958 | 8 |
| *United States* v. *Cross*, 170 F. Supp. 303 | 19 |
| *United States* v. *DiGiovanni*, 397 F. 2d 409, certiorari denied, 393 U.S. 924 | 18 |




565-354—74——1

Cases—Continued

| | Page |
|---|---|
| *United States* v. *DiMichele*, 375 F. 2d 959, certiorari denied, 389 U.S. 838 | 8 |
| *United States* v. *Dionisio*, 410 U.S. 1 | 10 |
| *United States* v. *Fruchtmar*, 282 F. Supp. 537 | 16, 19 |
| *United States* v. *Knox*, 396 U.S. 177 | 18 |
| *United States* v. *Monia*, 317 U.S. 424 | 9, 13 |
| *United States* v. *Nickels*, 502 F. 2d 1173 | 18 |
| *United States* v. *Parker*, 244 F. 2d 943 certiorari denied 355 U.S. 836 | 18 |
| *United States* v. *Pommerening*, 500 F. 2d 92 petition for a writ of certiorari pending, No. 72–229 | 18 |
| *United States* v. *Rangel*, 365 F. Supp. 155 | 5 |
| *United States* v. *Russell*, 411 U.S. 423 | 20 |
| *United States* v. *Scully*, 225 F. 2d 113, certiorari denied, 350 U.S. 897 | 8 |
| *United States* v. *Thayer*, 214 F. Supp. 929 | 19 |
| *United States* v. *Washington*, No. 7609, decided November 6, 1974 (D.C. Ct. App) | 8 |
| *United States* v. *Winter*, 348 F. 2d 204, certiorari denied, 382 U.S. 955 | 18 |
| *United States* v. *Wong*, C.A. 9 No. 74–1636, decided September 24, 1974, petition for a writ of certiorari pending, No. 74–635 | 6, 8, 9, 12 |
| *United States ex rel. Vajtaver* v. *Commissioner* 273 v.s.. 103 | 13 |

Constitution and statutes:

| | |
|---|---|
| United States Constitution: | |
| Fifth Amendment | 2 |
| Sixth Amendment | 14 |
| 18 U.S.C. 1623 | 2 |
| Criminal Justice Act, 18 U.S.C. 3006A(a) | 13 |
| 21 U.S.C. 846 | 4, 5 |


# In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

*v.*

ROY MANDUJANO

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, p. 1A–20A) is reported at 496 F. 2d 1050. The opinion of the district court (App. D, *infra*, pp. 25A–42A) is reported at 365 F. Supp. 155.

## JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 21A–22A) was entered on June 28, 1974. A petition for rehearing was denied on October 16, 1974

(App. C, *infra*, pp. 23A–24A). On November 12, 1974, Mr. Justice Powell extended the time to petition for a writ of certiorari to and including December 15, 1974 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether a "putative defendant" called as a grand jury witness is entitled to be warned, prior to testifying, of his Fifth Amendment privilege.

2. Whether such a "putative defendant" is entitled prior to testifying to complete *Miranda* warnings.

3. Whether every grand jury witness against whom the government has incriminating evidence at the time he is called to testify is a "putative defendant."

4. Whether, if a warning of some sort is required, the government's failure to give adequate warning to a "putative defendant" should result in the suppression of his testimony in a subsequent prosecution for perjury.

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

2. 18 U.S.C. 1623 provides in pertinent part:

> (a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration * * * shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *



## STATEMENT

On or before March 29, 1973, a government agent assigned to the Office of Drug Abuse Law Enforcement, received information that respondent was dealing in narcotics (Tr. 24).[1] The agent met respondent on that date, discussed the purchase of one ounce of heroin, and gave respondent $650 (Tr. 24, 26). Respondent thereupon made several telephone calls in order to procure the heroin. When respondent's attempts to procure heroin were unsuccessful, respondent returned the money to the agent (Tr. 26–27).

The agent subsequently informed the government prosecutor, who was seeking witnesses who had possible knowledge of local narcotics traffic to testify before a special drug grand jury then in session, that respondent would be an appropriate grand jury witness (Tr. 29). The prosecutor was informed of the aborted heroin transaction, but he later informed the district court, he did not at that time consider the transaction to have been an indictable offense (Tr. 19).

Respondent was called before the grand jury on May 2, 1973, to determine the identities of his poten-

[1] "Tr." refers to the one volume transcript of the suppression hearing held on August 28, 1973. "8/24 Tr." refers to the one volume transcript of the suppression hearing held on August 24, 1973. "G. Tr." refers to the transcript of respondent's grand jury testimony, a copy of which has been lodged with the Clerk of this Court.

tial sources of heroin (Tr. 20). The prosecutor testified that he did not intend to seek an indictment against respondent at that time (Tr. 15–16). At the outset of respondent's appearance, the following colloquy took place (G. Tr. 3–4):

> Q. * * * Now you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?
>
> A. Do I answer all the questions you ask?
>
> Q. You have to answer all the questions except for those you think will incriminate you in the commission of a crime. Is that clear?
>
> A. Yes, sir.
>
> Q. You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those truthfully, in other words, if you lie about certain questions, you could possibly be charged with perjury. Do you understand that?
>
> A. Yes, sir.

In order to lay the foundation for broader questions designed to elicit the names of drug traffickers (Tr. 21–22), the prosecutor then asked respondent if during the past year he had talked to anyone about selling heroin, had promised to obtain and sell heroin to anyone, or had accepted money to buy heroin for anyone (G. Tr. 19–20). Respondent denied involvement in any such events or activities.

Respondent was indicted on June 13, 1973, for attempt to distribute heroin, in violation of 21 U.S.C.



846, and for making false declarations before the grand jury, in violation of 18 U.S.C. 1623.

Respondent subsequently moved to suppress his testimony before the grand jury. The district court, after an evidentiary hearing, granted the motion on the ground that respondent was a "putative" or virtual defendant when called before the grand jury and was therefore entitled to full *Miranda* warnings (App. D, *infra*, pp. 37A–38A).[2] Because the warnings he received were not full *Miranda* warnings, the district court suppressed respondent's testimony.[3]

The court of appeals affirmed, adopting the district court's finding that respondent was a "virtual or putative defendant" when called before the grand jury, and agreeing with the district court that such a "putative defendant" is entitled to full *Miranda* warnings

---

[2] Respondent's motion to suppress was considered jointly with a motion raised under similar circumstances and granted by the district court in *United States* v. *Rangel*, affirmed, 496 F. 2d 1059 (C.A. 5). In *Rangel*, however, the warning given the witness prior to testifying involved a double negative, which made it confusing and ambiguous, and contained an implicit threat that the witness would be held in contempt if he wrongly refused to answer. Because these factual circumstances raise a question whether Rangel may not in fact have been compelled in some significant way to testify by the form of his warning or deterred by it from invoking his privilege, Rangel's case does not squarely present the issue we are raising, and we are not petitioning in his case.

[3] The government, without the use of respondent's grand jury testimony, proceeded to trial against respondent on the attempt to sell heroin count. Respondent's conviction on the attempt count was affirmed by the court of appeals in an opinion separate from the opinion in the present case. *United States* v. *Mandujano*, 499 F. 2d 370. Respondent's petition for a writ of certiorari is presently pending before this Court, No. 74–5441.

(App. A, *infra,* p. 12A). The court likewise found the warnings given respondent inadequate and reasoned that the prosecutor's conduct, which "smacked of entrapment," was therefore "unfair" (App. A, *infra,* p. 15A). The court concluded that the entire proceedings violated respondent's due process rights under the Fifth Amendment (App. A, *infra,* p. 19A), and therefore agreed with the district court that respondent's perjurious testimony should be suppressed.

**REASON FOR GRANTING THE WRIT**

This case presents the same two related and important questions concerning procedures for questioning grand jury witnesses and remedies for the government's failure to follow required procedures that we have presented in our pending petition for a writ of certiorari to review the decision of the Ninth Circuit in *United States* v. *Rose Wong,* No. 74-635, and over which the circuits are in conflict: first, whether a grand jury witness suspected of participating in the substantive offense must, prior to testifying, be advised of his Fifth Amendment privilege against self-incrimination; and second, assuming that some such advice is constitutionally required, whether the government's failure to give an adequate warning should result in suppression of a "putative defendant's" testimony in a subsequent prosecution for perjury.

This case also poses two additional, related issues with which the court of appeals' opinion in *Rose Wong,* C.A. 9, No. 74-1636, decided September 23, 1974, and our petition in that case, did not directly



deal (in connection with which it also is assumed that some warning is constitutionally required): (1) whether the "putative defendant" concept is to be defined by reference to subjective criteria reflecting the prosecutive intent of government attorneys, or objective criteria that consider whether the government possesses incriminating evidence against the witness at the time he is called to testify; and (2) whether complete *Miranda* warnings are constitutionally required, including a statement of a right to remain completely silent and notice of a right to appointed counsel to be present outside the grand jury room.

In requiring that complete *Miranda* warnings be given prior to the grand jury testimony of a "putative defendant" (defined solely by reference to the fact that the prosecutor has incriminating evidence against him) and suppressing the perjured testimony of a "putative defendant" who had not received such warnings, the court of appeals in the instant case significantly and unjustifiably impeded the investigative power of grand juries, which "must be broad if its public responsibility is adequately to be discharged." *United States* v. *Calandra,* 414 U.S. 338, 344. It also adopted an unduly expansive notion of the content of the self-incrimination provision of the Fifth Amendment, which does not require the giving of a warning appropriate to police interrogation in the grand jury context and does not in any event permit a witness who receives an inadequate warning to lie to the grand jury with impunity.

1. In holding that the Due Process Clause of the Fifth Amendment requires that a so-called "putative defendant" be given, prior to grand jury questioning, full *Miranda* warnings, the court of appeals in the instant case, as did the Ninth Circuit in *Rose Wong, supra,* carved out an unwarranted exception to the well-established rule that grand jury witnesses need not be given any warnings prior to testifying even when their responses might tend to incriminate them.[4] The court distinguished a "putative defendant"—"someone whom the government had knowledge of having committed a crime, * * * whom the government had planned to indict * * * and against whom it was gathering incriminating evidence" (App. A, *infra,* p. 7A)—from an ordinary grand jury witness, holding that the former is entitled to *Miranda* warnings before testifying.[5] We submit, as we did in our

[4] See, *e.g., United States* v. *Scully,* 225 F. 2d 113, 116 (C.A. 2), certiorari denied, 350 U.S. 897; *United States* v. *Corallo,* 413 F. 2d 1306 (C.A. 2), certiorari denied, 396 U.S. 958; *United States* v. *Di Michele,* 375 F. 2d 959 (C.A. 3), certiorari denied, 389 U.S. 838; see also *Commonwealth of Pennsylvania* v. *Columbia Investment Corp., et al.,* 325 A. 2d 289 (Pa. Sup. Ct.).

[5] The Sixth Circuit has suggested that it would subscribe to the same distinction for purposes of requiring warnings. See *United States* v *Luxenberg,* 374 F. 2d 241, 246; *Stanley* v *United States,* 245 F. 2d 427, 434. In no case, however, has the Sixth Circuit intimated that any blanket "right to remain silent" should apply to a "putative defendant" before the grand jury.

The District of Columbia Court of Appeals has recently held that a "putative defendant" must be given *Miranda* warnings before appearing in the grand jury room for questioning and must also be informed that he is considered to be a "putative defendant." *United States* v. *Washington,* D.C. Ct. App. No. 7609, decided November 6, 1974, slip op. 1–4.



petition for a writ of certiorari in *Rose Wong* (a copy of which we are sending to counsel for respondent), that this distinction is warranted by neither precedent nor logic, and that no grand jury witness is entitled, prior to testifying, to any warning of his Fifth Amendment rights, let alone complete *Miranda* warnings.

The Fifth Amendment speaks of compulsion. "It does not preclude a [grand jury] witness from testifying voluntarily in matters which may incriminate him." *United States* v. *Monia,* 317 U.S. 424, 427. Nor does failure to advise of rights make subsequent testimony any less voluntary. See *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 226. Although a witness who testifies before a grand jury may invoke the Fifth Amendment privilege if he has reasonable grounds for believing that truthful responses will tend to be incriminating, *Counselman* v. *Hitchcock,* 142 U.S. 547, "he must claim [the privilege] or he will not be considered to have been 'compelled' within the meaning of the Amendment," *United States* v. *Monia, supra,* 317 U.S. at 427, even if not specifically informed of the right to invoke the privilege.[6]

A respondent's answers before a grand jury are no less *voluntary* because he is suspected of involvement in the criminal enterprise under investigation than are the responses of any other witness. He may, like any other witness, claim the Fifth Amendment privilege as an alternative to self-incrimination. The greater likelihood that one suspected of having taken part in

[6] See cases cited at n. 4, *supra.*

the offenses that the grand jury is investigating will give responses that may be incriminating does not affect the voluntariness of the responses. Nor is such a grand jury witness more likely to be ignorant of his Fifth Amendment privilege than an ordinary witness who, like "virtually every schoolboy[,] is familiar with the concept, if not the language, of the provision that reads: 'No person * * * shall be compelled in any criminal case to be a witness against himself * * *'" *Michigan* v. *Tucker,* No. 73–482, decided June 10, 1974, sup. op. 5.

Nor is the position of a so-called "putative defendant" before a grand jury analogous to the situation of an accused during custodial police interrogation, where explicit warnings are constitutionally required in order to minimize the compulsion inherent in solitary custodial settings difficult to supervise by neutral authority. The critical concern of the Court in *Miranda* was the dangers inherent in "incommunicado" interrogation. *Miranda* v. *Arizona,* 384 U.S. 436, 445. By contrast, no warning is needed in a grand jury setting, where questioning takes place before 23 private citizens under the supervision of a presiding judge and where, if the time scheduled for a witness's appearance is inconvenient, it can generally be altered. See *United States* v. *Dionisio,* 410 U.S. 1; *Miranda* v. *Arizona, supra,* 384 U.S. at 461; *Orozco* v. *Texas,* 394 U.S. 324.

Nor, finally, can it be assumed that the government's primary motive in summoning a potential defendant before a grand jury is, as the court below suggested, to "bait" the witness into incriminating



himself or committing perjury (App. A, *infra,* p. 15A). On the contrary, a witness such as respondent, suspected of having taken part in a substantive offenses of the kind into which the grand jury is inquiring, is likely to represent one of the best sources of information critical to the grand jury's inquiry as to whether a crime has been committed and, if so, the identity of others, who may be involved. In the instant case, for example, since respondent offered to procure heroin from his sources for sale to the federal agent, it was reasonable to conclude that respondent could supply the grand jury with the names of his sources for heroin and thereby help the grand jury determine who was involved in heroin trafficking in the district. Alternatively, such a witness may wish to confess his part in the offense (the Constitution reflects no policy against voluntary confessions) or may be able to exculpate himself to the satisfaction of the grand jury.

In any event, the Fifth Amendment is directed to the prevention of compulsory self-incrimination, not to the suppression of what may be construed as improper prosecutorial motive. Contrary to the conclusion of the court of appeals, we fail to see what is unfair to the witness in governmental efforts to elicit relevant information in the possession of the witness by normal grand jury questioning, provided that there has been no improper compulsion of testimony.

The court of appeals' blanket requirement that every "putative defendant" be given *Miranda* warnings prior to testifying would tend to discourage the

cooperation that is necessary for the grand jury to determine whether criminal proceedings should be instituted against any person. It could place an unwarranted stumbling block in the way of the grand jury's investigation, predicated upon difficult forecasts about who is apt to be indicted. As this Court stated in *Blair* v. *United States,* 250 U.S. 273, 282, "the scope of [the grand jury's] inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation."

2. Even assuming that a so-called "putative defendant" is entitled to some Fifth Amendment warning prior to testifying before a grand jury, the warning respondent received, informing him that "[y]ou don't have to answer questions which would incriminate you," adequately apprised him of his Fifth Amendment rights. Contrary to the assertion of the court of appeals, we find no justification in logic or history for claiming that a putative defendant is constitutionally entitled, in testifying before a grand jury, to invoke a "right to remain silent" or to have appointed counsel available for consultation outside the grand jury room. Such rights and warnings, while perhaps appropriate to mitigate compulsion potentially inherent in police custodial interrogation, were never intended by this Court to "create a Constitutional straightjacket" (*Miranda* v. *Arizona, supra,* 384 U.S. at 467) to be applied across-the-board to every form of official questioning.[7]

[7] The Ninth Circuit in *Rose Wong* required only that the "putative defendant" be apprised of his "right to remain silent."



No witness appearing before a grand jury has a "right to remain silent" *per se.* Rather, he may claim his Fifth Amendment privilege with respect to responses that he has reasonable grounds for believing may tend to incriminate him. See *United States* v. *Monia, supra,* 317 U.S. at 427; *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103, 113; *United States* v. *Kordel,* 397 U.S. 1, 10. However, he may be compelled to provide even these responses, under penalty of contempt, if he invokes his privilege and the court grants him immunity coextensive with the privilege. *Kastigar* v. *United States,* 406 U.S. 441. An entitlement to "remain silent" during grand jury questioning, akin to permissible silence during police interrogation, utterly fails to recognize the difference in functions and powers between the police and the grand jury. The court of appeals' equation of the grand jury with the police in this context materially undermines the grand jury's legitimate power of investigation and gives certain witnesses such as respondent, who possess information crucial to the grand jury's determinations, the power effectively to block or impede the grand jury's inquiry. "The duty to testify may on occasion be burdensome and even embarrassing. It may cause injury to a witness' social and economic status," *United States* v. *Calandra, supra,* 414 U.S. at 345, yet the public's overriding interest in full disclosure before grand juries may not be overborne except by a valid Fifth Amendment claim (or other recognized testimonial privilege).

In addition to holding that a "putative defendant" must be advised that he may remain silent in the face of grand jury questioning, the court of appeals further ruled that such a witness must be apprised of a right to have counsel appointed if he cannot afford retained counsel. It stated this conclusion without analysis of the source of this right, and the ruling, if allowed to stand, has potentially significant ramifications.

We believe that the government has no duty to inform grand jury witnesses who are not actual defendants of a right to appointed counsel, even if a right to procure appointment of counsel on request exists, which is itself a dubious proposition.[8] While this Court initially embarked on a course that might ultimately have led to recognition of a Sixth Amendment right to counsel for "putative defendants" (see *Escobo* v. *Illinois,* 378 U.S. 478), it quickly abandoned that analysis in *Miranda* itself and has recently held that the Sixth Amendment right to counsel does not attach prior to "[t]he initiation of judicial criminal proceedings." *Kirby* v. *Illinois,* 406 U.S. 682, 689; see also *Michigan* v. *Tucker,* No. 73–482, decided June 10, 1974, slip op. 4.

Nor, for the reasons already discussed in connection with the supposed "right to remain silent," does the rationale of *Miranda* itself support a requirement to advise grand jury witnesses of a right to counsel.

[8] While not conclusive of the constitutional question, we note that, unless a Sixth Amendment right to counsel has attached, a grand jury witness who is not under arrest and has not been formally charged has no right to appointed counsel under the Criminal Justice Act. See 18 U.S.C. 3006A (a).



Access of an arrestee to the advice of counsel prior to custodial interrogation was considered necessary as an antidote to the special hazards of compulsion, detailed in the *Miranda* opinion, that were found to be ubiquitous in that context. With those fears absent in the grand jury context, gone too is the need for the special medicine prescribed by *Miranda.*

3. The "putative defendant" approach of the court of appeals in this case is, we believe, pregnant with numerous and varied problems for both prosecutors and courts because, among other things, of the difficulties of identifying who is within this category. If the attorney managing the grand jury mistakes a "putative defendant" for an ordinary witness, the sanctions for perjury evaporate. Conversely, the ordinary witness given *Miranda* warnings because of the fear that he may later be held by a court to have been a "putative defendant" may be discouraged from providing useful or needed evidence for the grand jury (it is, after all, the premise of the court's decision that the witness who has been warned will be less likely to testify fully and freely).

If there must be such a concept as that of "putative defendant" in the grand jury contest, it should be defined with considerable care. On the facts of the instant case, we submit that—contrary to the finding of the district court, upon which the court of appeals relied—respondent was not a "putative defendant" when he was called before the grand jury. The government attorney who was presenting witnesses to the grand jury testified that respondent's case had not been considered for presentation to the grand jury

565-354—74——3

prior to the time of respondent's testimony, that the files on the case had been closed following the aborted transaction between respondent and the federal agents, and the prosecutor had "no idea [respondent] would be indicted" (Tr. 15). Indeed, the prosecutor stated that he did not consider the transaction between respondent and the federal agent to have been an indictable offense (Tr. 19), and he only learned that it was when later reviewing a possible perjury indictment with another government attorney (8/24 Tr. 56–57).

Nevertheless, despite these assurances, the district court considered the prosecutor's knowledge of the transaction and the "high likelihood that the answers provided by the [respondent] would furnish material for further action on the part of the government" sufficient to "belie the government's protestations of innocent intent with respect to the possibility of future prosecutions" (App. D, *infra*, p. 30A, 31A). In disregarding the prosecutor's denial, the district court relied upon the reasoning of the district court for the Northern District of Ohio in *United States* v. *Fruchtman*, 282 F. Supp. 534 (N.D. Ohio), ~~certiorari denied, 400 U.S. 849~~, in which a similar denial by the government that the witness had been a potential defendant at the time of questioning was deemed irrelevant. (*id.* at 536):

> [I]t does not appear that the examination would have been conducted any differently if [the witness] had [been a potential defendant]. * * * [A] man's rights do not depend on the subjective intent of the prosecutor nor upon the prosecutor's knowledge as to what acts, if committed, might constitute an offense under the law.



The test that the district court employed for determining whether respondent was a "putative defendant"—looking to the incriminating evidence available to the prosecutor prior to questioning—would in effect bring every witness against whom the government has some incriminating evidence within the protective ambit of the "putative defendant" label. As to many of these witnesses, however, the government has no intention of seeking an indictment—because the witness is more valuable as a source of evidence against others, because the witness's alleged offense is trivial relative to the time and resources necessary to prosecute him, or because evidence is inadequate to indict. Indeed, the district court's broad test would shield precisely those witnesses whose knowledge of illegal activities is crucial to a grand jury's determination as to whether a crime has been committed and, if so, who is involved.[9]

The proper test for identifying a "putative defendant," we submit, should require that both the objective and the subjective standard be satisfied—that is, there must be sufficient evidence to support an indictment at the time the witness is called, and it must also be established that the witness was in fact a target of the grand jury's investigations whom the prosecutor expected to be indicted. In any event, the question of

[9] While the matter is speculative, it seems likely that neither *Mandujano* nor *Rose Wong* would have been prosecuted at all had they cooperated by testifying truthfully before the grand jury.

establishing a clear definition of the "putative defendant" concept is an important one that should be undertaken by this Court if the concept is to be given controlling importance in the rules governing treatment of grand jury witnesses.

4. In holding that testimony of a "putative defendant" given without prior *Miranda* warnings is inadmissible in a subsequent prosecution for perjury, the court of appeals in the instant case created—as did the Ninth Circuit in *Rose Wong, supra*—an exception to the well-established rule that "the immunity afforded by the constitutional guarantee [against compulsory self-incrimination] relates to the past and does not endow the person who testifies with a license to commit perjury." *Glickstein* v. *United States* 222 U.S. 139, 142; see also *Harris* v. *New York*, 401 U.S. 222, 225; *Bryson* v. *United States*, 396 U.S. 64; *United States* v. *Knox*, 396 U.S. 77. In so doing, the court also brought itself into sharp conflict with decisions of the Second, Seventh, and Tenth Circuits,[10] which have held that even if putative defendants are entitled to some *Miranda* warnings, failure to give the warnings does not license them to commit perjury.

If a witness is improperly compelled to incriminate himself, his incriminating statements may be excluded

[10] *United States* v. *Winter*, 348 F. 2d 204 (C.A. 2), certiorari denied, 382 U.S. 955; *United States* v. *Parker*, 244 F. 2d 943 (C.A. 7) certiorari denied 355 U.S. 836; *United States* v. *DiGiovanni*, 397 F. 2d 409, 412 (C.A. 7), certiorari denied, 393 U.S. 924; *United States* v. *Nickels*, 502 F. 2d 1173 (C.A. 7); *Cargill* v. *United States*, 381 F. 2d 849 (C.A. 10), certiorari denied; 389 U.S. 1041; *United States* v. *Pommerening*, 500 F. 2d 92 (C.A. 10), petition for writ of certiorari pending, No. 74-229.



from use by the prosecution. But he may not avoid the compulsion by committing perjury. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson* v. *United States, supra*, 396 U.S. at 72. The court of appeals in the instant case, however, found this broad principle inapplicable to a "putative defendant" who lies to a grand jury, since the government's conduct in bringing such a witness before a grand jury without providing adequate warnings is "unfair" (App. A, *infra*, p. 15A;). The court's finding of "unfairness" was based upon an inference that the government's primary purpose in asking a "putative defendant" incriminating questions was to "entrap" him into committing perjury. As we have already indicated, however, the government has many legitimate purposes for asking a witness, suspected of taking part in the criminal activities, questions to which truthful responses may tend to be incriminating. See. p. 10, *supra*.[11]

Moreover, a "putative defendant" who lies to a grand jury rather than incriminate himself cannot be considered to be "entrapped" into committing per-

[11] The grand jury's questioning of a witness suspected of having taken part in a criminal offense is different from the abuse of process resulting from repeated summoning of a witness before a tribunal, or summoning a witness even once before a tribunal without jurisdiction to conduct the inquiry, where such action is apparently designed to maximize the opportunity for perjury. See *Brown* v. *United States*, 245 F. 2d 549, 555 (C.A. 8); *United States* v. *Thayer*, 214 F. Supp. 929 (D. Colo.); *United States* v. *Cross*, 170 F. Supp. 303 (D.D.C.); *United States* v. *Icardi*, 140 F. Supp. 383 (D.D.C.); *United States* v. *Fruchtman*, 282 F. Supp. 534 (N.D. Ohio).

jury, as the concept of entrapment has been articulated by this Court. The government does not implant the design to commit perjury in the mind of such a witness. See *United States* v. *Russell*, 411 U.S. 423, 436. Nor does the government thwart whatever predisposition to tell the truth the witness may have. See *Sorrells* v. *United States*, 287 U.S. 435; *Sherman* v. *United States*, 356 U.S. 369.

Even if such questioning without adequate warning were "unfair," however, it does not follow that the resulting testimony should be inadmissible in a prosecution for perjury. The exclusionary rule is generally "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, 414 U.S. at 348. Assuming that some prior warning is required, it seems to us unlikely as an empirical matter that prosecutors would risk losing the use of confessions or other incriminating evidence for the sake of obtaining evidence of perjury.

**CONCLUSION**

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
*Solicitor General.*
HENRY E. PETERSEN,
*Assistant Attorney General.*
ROBERT B. REICH,
*Assistant to the Solicitor General.*
PETER M. SHANNON, JR.,
JAMES HUNOLT,
*Attorneys.*

DECEMBER 1974.

## APPENDIX A

United States Court of Appeals,
for the Fifth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

ROY MANDUJANO, DEFENDANT-APPELLEE

(No. 73-3353)

[June 28, 1974]

Proceeding on motion of defendant to suppress his testimony before special grand jury. The United States District Court for the Western District of Texas, Adrian A. Spears, Chief Judge, 365 F.Supp. 155, granted the motion to suppress, and Government appealed. The Court of Appeals, Tuttle, Circuit Judge, held that (1) although as a general rule a grand jury witness is not entitled to warning of his rights to appointed counsel and to remain silent, the full Miranda warnings should have been accorded defendant who, in testifying before the grand jury, was in the position of a virtual or putative defendant, where the Government had focused upon defendant as having committed a crime, where it called him with one eye on prosecution, and where the questioning smacked of entrapping defendant to either incriminate himself or commit perjury, and (2) despite the general rule that witnesses uninformed of their constitutional rights should not be allowed a license to commit perjury before the grand jury, all the testimony, incriminating

and perjurious, of a grand jury witness will be suppressed, where the prosecuting officers bring a putative of virtual defendant before the grand jury for the purpose of obtaining incriminating or perjurious testimony.

Judgment *affirmed*.

See also, 5 Cir. 496 F. 2d 1057.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, COLEMAN and AINSWORTH, Circuit Judges.

TUTTLE, CJ.

On May 2, 1973, appellee Mandujano appeared as a witness before the DALE (Druge Abuse Law Enforcement) Grand Jury, pursuant to a subpoena. The following warnings were given Mandujano:

> Q: Now you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?
>
> A: Do I answer all the questions you ask?
>
> Q: You have to answer all the questions except for those you think will incriminate you in the commission of a crime. Is that clear?
>
> A: Yes, sir.
>
> Q: You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those truthfully, in other words, if you lie about certain questions, you could possibly be charged with perjury?

Mandujano was further advised that he could have an attorney outside the grand jury room; however, he was not told that he had a right to have appointed counsel outside the grand jury room, that what he



said could be used against him in later proceedings, and that he had a right to remain silent.[1]

A federal narcotics agent had reported that in March, 1973, he offered Mandujano money for the purchase of heroin and gave him $650 for the attempted purchase. The government attorney who questioned Mandujano before the grand jury testified at the motion to suppress that he had discussed with the agent the circumstances of this attempted buy in preparation for Mandujano's appearance before the grand jury. Evidence taken on the motion to suppress also showed that the government attorney requested suggestions for witnesses to be subpoenaed before the grand jury from the agent who had dealt with Mandujano and the agent recommended calling Mandu-

---

[1] Actually Mandujano told the government attorney that he didn't have the money to get a lawyer. The following conversation transpired between them:

"Q: Have you discussed your presence here with anybody?

"A: My wife.

"Q: Have you contacted a lawyer in this matter?

"A: No, sir, I haven't.

"Q: I take that to mean then that you do not wish the services of a lawyer here today?

"A: I don't have one. I don't have the money to get one.

"Q: Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to, let me know.

"A. Yes, sir.

"Q: Is that clear?

"A: (Nod affirmative)."

At no time was Mandujano told that an attorney would be furnished him free of charge if he were financially unable to employ one.

jano and then reported to the attorney how the actual attempt had occurred.

Mandujano was asked the following questions, *inter alia*, by the government attorney before the grand jury:

> Q: Have you ever talked with anybody about selling it? Has anybody tried to buy heroin from you? Have you tried to get heroin for them in order to sell to them?
>
> A: No, sir.
>
> Q: Are you sure of that?
>
> A: Yes, sir.
>
> Q: In other words, no one has ever come up to you and wanted to buy heroin?
>
> A: No, sir.
>
> Q: And you have never told anybody that you would try to get heroin to sell to them?
>
> A: No, sir.
>
> Q: Now, you can say here today that you have not discussed the sale of heroin with anybody in the last year?
>
> A: I don't understand you, sir.
>
> Q: Have you talked to anybody about selling heroin to them during the last year?
>
> A: No, sir.
>
> Q: Are you sure about that?
>
> A: I just, you know, I discuss it, you know, when we buy it, you know, to fix it just, you know.
>
> Q: Has anyone ever asked you if they could buy an ounce of heroin or more from you?
>
> A: No, sir.
>
> Q: Let me ask you once again, Mr. Mandujano, have you ever talked to anybody about selling them heroin in the last year?
>
> A: No, sir.
>
> Q: No one has ever given you any money—
>
> A: No.
>
> Q: —to go buy them heroin?
>
> A: No, sir.



> Q: In other words, if you had $650 right now—
>
> A: Yes, sir.
>
> Q: —Do you think you would be able to purchase an ounce of heroin? . . ."

This interrogation tracked the exact facts of the actual contact between the federal narcotics agent and Mandujano.

The appellee was subsequently indicted in count 1 under 21 U.S.C.A. § 846 for attempt to distribute one ounce of heroin on or about the 29th of March, 1973, and in count 2 under 18 U.S.C.A. § 1623 for making false representations. The perjury count was based on Mandujano's denial before the grand jury of any attempt to obtain or sell heroin or any solicitation to do so.

The district court granted appellee's motion to suppress his testimony before the grand jury, finding that appellee was a virtual or putative defendant in custody under the *Miranda*[2] decision, and therefore should have been given all *Miranda* warnings. United States v. Mandujano, 365 F.Supp. 155 (W.D.Tex. 1973). The district court determined that the warnings given were inadequate and that appellee could not be deemed to have voluntarily waived his Fifth Amendment right to remain silent. Appellee was convicted under count 1 for attempt to distribute heroin, *without* use of his grand jury testimony.

## I. "Putative or Virtual" Defendant

Given the nature of the investigation and the questions tendered by the government attorney, the district court held, and this Court agrees, that full

---

[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1965).

*Miranda* warnings should have been accorded Mandujano who was in the position of a virtual or putative defendant. The district court aptly portrayed the circumstances warranting the fact finding that Mandujano was a virtual or putative defendant during his appearance before the grand jury:

> "The government maintains that neither case was considered for presentation to the grand jury prior to the testimony of the defendants before that body, and that both files had been closed following the contact between the defendants and the law enforcement officers; nevertheless, the facts of the case belie the government's protestations of innocent intent with respect to the possibility of future prosecutions. The special attorney who had conducted the questioning testified that he was well aware of the previous contact with the defendants in attempts to buy from them, as well as the exact circumstances involved in each attempted buy. The transcript of the grand jury proceedings reveals deliberate and careful attention to questions which specifically delved into the facts concerning these contacts between the defendant and government agents. The special attorney was aware that no case had been made, and though this Court does not presume any improper motives on the part of the government agents or the special attorney, it strains credulity to suggest that the special attorney did not have one eye on a possible prosecution of the defendants. The government had in fact already attempted to make a case against each defendant. Note too that each defendant, immediately after denying any contact about an attempted sale, was asked in the very next question about the validity of that answer . . . Considering the totality of the circumstances in this case, the questioning of the defendants before the grand jury smacks of entrapment.



> Moreover, given the fact that the investigatory files involving the attempts to buy from both defendants had been closed, the questions posed presented a high likelihood that the answers provided by the defendants would furnish material for further action on the part of the government. If the defendants admitted that they had offered to buy heroin for the undercover agent who approached them, the government could possibly have used such an admission in its case-in-chief in connection with the attempted sale. See United States v. Leighton, 265 F.Supp. 27 (S.D.N.Y. 1967), cert. denied, 390 U.S. 1025, 88 S.Ct. 1412, 20 L.Ed.2d 282 (1968); United States v. Montos, 421 F.2d 215 (5th Cir.), cert. denied, 397 U.S. 1022, 90 S.Ct. 1262, 25 L.Ed.2d 532 (1970). The denial by defendants that they had conversations about procuring heroin for the officers left them open to the consequent indictments for perjury. Actually, therefore, their only safe harbor would have been to remain silent, and this option was, in effect, denied to them." United States v. Mandujano, 365 F.Supp. at 158–159 (W.D.Tex.1973).[3]

We construe the foregoing statements by the trial court to be findings that the government had focused upon Mandujano as someone whom the government had knowledge of having committed a crime, as a person whom the government had planned to indict as it had one eye on prosecution, and against whom it was gathering incriminating evidence. Also the discussion indicates that the trial court found that when Mandu-

---

[3] The reference to "defendants" is made in the plural because the district court issued a joint opinion for this case and United States v. Rangel, 365 F. Supp. 155 (W.D. Tex. 1973), because it found that the two cases, though not consolidated and not involving the same transaction, embodied a virtually identical set of circumstances.

jano was brought into the grand jury room, the government then knew that an affirmative answer to questions put to him would amount to a confession of guilt of trafficking in heroin.

Although this Court has recently pretermitted the question of the scope of *Miranda* in the context of a putative defendant before a grand jury investigation, United States v. Morado, 454 F.2d 167 (5th Cir. 1972) and Mattox v. Carson, 424 F.2d 202 (5th Cir. 1970), cert. denied, 400 U.S. 822, 91 S.Ct. 43, 27 L.Ed.2d 51 (1971), we have recognized that as a general rule a grand jury witness is not entitled to warnings of his right to appointed counsel and his right to remain silent.[4] The Court of Appeals for the Sixth Circuit, however, has carved out the exception that when a person ceases to be merely a witness in a general investigation and becomes placed "virtually in the position of a defendant," then the full panoply of rights under *Miranda* due a person in custody must be afforded. See United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967); United States v. Fruchtman, 282 F.Supp. 534 (N.D. Ohio 1968), cert. denied, 400 U.S. 849, 91 S.Ct. 39, 27 L.Ed.2d 86 (1970); Stanley v. United States, 245 F.2d 427 (6th Cir. 1957).[5]

[4] *Morado, supra* at 173. Robinson v. United States, 401 F.2d 248 (9th Cir. 1968); United States v. DiMichele, 375 F.2d 959 (3rd Cir. 1967); United States v. Winter, 348 F.2d 204 (2d Cir. 1965); United States v. Parker, 244 F.2d 943 (7th Cir. 1957); United States v. Scully, 225 F.2d 113, 116 (2d Cir. 1955).

[5] In United States v. Fruchtman, *supra*, in circumstances similar to the instant case, the court found the witness to be a virtual defendant. There the government attorney submitted an affidavit denying that the witness was a potential defendant at the time of questioning; yet, the court noted that this attorney had also read investigative reports detailing the circumstances about which the witness was questioned before the grand jury. These facts are similar to those here, where the special government attorney read the narcotics agent's report prior to the grand jury session.



In United States v. Morado, *supra* at 173, we have already recognized the force of the argument that if an investigation has passed beyond the stage of a general inquiry and has focused upon the defendant, then the defendant would be in the position of a virtual defendant:

> Without intimating whether this circuit will agree with this 'virtual defendant' perspective, we note that its emphasis is upon the same factor we have considered to be of prime importance in determining whether or not a man is 'in custody' as that term is used in *Miranda*: 'has the focus of the investigation centered upon him?' United States v. Phelps, 443 F.2d 246 (5th Cir. 1971); United States v. Akin, 435 F.2d 1011 (5th Cir. 1970); United States v. Montos, 421 F.2d 215 (5th Cir. 1970); Bendelow v. United States, 418 F.2d 42 (5th Cir. 1969); Windsor v. United States, 389 F.2d 530 (5th Cir. 1968). If the investigation in the case at bar had passed beyond the stage of being a general inquiry into an unsolved crime of a suspected conspiracy, and had focused upon Solis as a defendant whom the government planned to indict and against whom it was gathering incriminating evidence, we would face the necessity of embracing or rejecting this rule.

The language in *Morado* is particularly applicable in the case at bar because this investigation clearly had passed beyond the stage of general inquiry into an unsolved crime, and had focused upon the defendant as someone whom the government had planned to

indict as it had one eye on prosecution, against whom it was gathering incriminating evidence, and against whom indictments were actually returned.[6] The fact that the questioning attorney immediately pounced upon Mandujano's denial that he had been contacted about the sale of heroin, indicated a clear and direct focus upon Mandujano as a future defendant. Moreover, the government attorney even mentioned the precise figure—$650—which had purportedly been given to Mandujano by the federal narcotics agent, plainly demonstrating that the previous transaction was clearly in the attorney's mind.

Also there was no basis for the perjury count of the indictment until after Mandujano's grand jury appearance. When the government attorney, aware of the alleged prior transaction, asked Mandujano about any previous heroin solicitation or sale, he knew that any truthful answer by Mandujano would be incriminating and therefore protected by the Fifth Amend-

[6] This Court in Brown v. Beto, 468 F.2d 1284, 1286 (5th Cir. 1972), discussed at length the application of *Miranda*, stating: "Before law enforcement officers can subject a citizen to custodial interrogation, he must first have been given the *Miranda* warnings. In *Miranda* 'custodial interrogation' was defined as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'[4] This court has yet to formulate a general rule for distinguishing custodial from non-custodial interrogation but instead has preferred to take a case-by-case approach.[5] . . . In making the distinction between custodial and non-custodial interrogation this court has singled out certain criteria as having special significance: these include probable cause to arrest, subjective intent of the police, subjective belief of the defendant, and focus of the investigation.[7] Although none of these factors is alone determinative, we have recently indicated that the most compelling is whether or not the focus of the investigation has finally centered on the defendant."



ment which Mandujano was entitled to plead. Thus, if the attorney proceeded to question actually anticipating an answer, he must have known that the response would require Mandujano to confess to a crime or commit perjury. The likelihood of Mandujano confessing a crime before the grand jury was certainly de minimis. The inference is easily drawn that the attorney's questioning was primarily baiting Mandujano to commit perjury. As perceived by the district court this case "smacks" of entrapping Mandujano to incriminate himself or commit perjury. His only "safe harbor" was to remain silent—a right of which the government failed to inform him.

The government asserts that since Mandujano negotiated for a heroin sale with the federal narcotics agent which did not result in a distribution due to appellee's being unable to procure heroin from his sources, therefore the government agents concluded that appellee must have had knowledge of a source for heroin. Consequently he was called before the grand jury only to obtain intelligence regarding known heroin sources, consistent with the purposes of the grand jury, and not in an attempt to obtain incriminating or perjurous statements from him. Nevertheless, as concluded by the district court, "the facts of the case belie the government's protestations of innocent intent with respect to the possibility of future prosecution." Moreover, the questions tendered by the government attorney simply could have inquired whether Mandujano knew any heroin dealers rather than focusing on whether anyone had ever solicited heroin from him.

Moreover, the warnings that were given were not adequate advisement even of the appellee's Fifth Amendment rights against self-incrimination. As

pointed out by the trial court, the questioning attorney "stressed not the right to remain silent, but the requirement that the defendant answer all the questions put to him, with limited exceptions. He did not stress the alternative of the defendant remaining silent in the face of a potentially [here certainly] damaging question."

Under the circumstances of this case, this Court agrees that Mandujano was a putative defendant in custody and was entitled to *Miranda* warnings.

## II. Remedy for Failure To Give Miranda Warnings

The more difficult issue here is whether the usual remedy for failure to give constitutional warnings, i.e., suppression of the testimony, can ever be employed in a situation where the testimony itself amounted to perjury.

Appellant relies heavily on United States v. Orta, 253 F. 2d 312 (5th Cir. 1958), to convince us that "[u]nder no circumstances" can a grand jury "witness" commit perjury and then successfully claim that the Constitution affords him protection from prosecution for that crime. Witness Orta was charged with having committed perjury at a grand jury investigation. The district court suppressed Orta's grand jury testimony, but this Court reversed, broadly stating, *supra* at 314:

> It is clear that the protection of the Fifth Amendment relates to crimes alleged to have been committed before the time when the testimony is sought. A *witness*, ignorant and uninformed of his constitutional rights, would not intelligently waive them if he testifies, thinking that he was compelled to do so. He might answer truthfully and thereafter assert the constitutional guaranty. *Under no circumstances, however, could he commit perjury and successfully claim that the Constitution afforded him protection from prosecution for that crime.* As said in Glickstein v. United States, 1911, 222 U.S. 139, 142, 32 S. Ct. 71, 73, 56 L. Ed. 128; '* * * the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury.'
>
> The only debatable question is one of the supervision of the conduct of Government representatives in the interest of fairness. In United States v. Scully, 2 Cir., 1955, 225 F. 2d 113, 116, the Court of Appeals for the Second Circuit held:
>
> '* * * the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a Grand Jury.'
>
> That holding is applicable to the present record. *There is no showing that the Grand Jury before which Orta testified was seeking to indict him or any other person already identified.* (Emphasis supplied).



Although clearly holding that a mere "witness" uninformed of his rights before the grand jury, even one concerning whom there is a "mere possibility" of indictment, may not commit perjury with impunity, the *Orta* court sounded the important caveat that the question of supervision of the conduct of government representatives in the interest of fairness may be debatable in some circumstances. The language in the *Orta* opinion, *supra* at 314,

> "There is no showing that the Grand Jury before which Orta testified was seeking to indict him or any other person already identified,"

highlights the important distinction between *Orta* and this case, demonstrating the wisdom of the caveat concerning the court's duty of supervision "in the interest of fairness." The instant case does not involve a mere "witness," but a putative, and subsequently actual, defendant. The facts showed that there was a mere possibility that a witness may later be indicted, but that the government deliberately subpoenaed a putative defendant before the grand jury primarily for the purpose of obtaining incriminating or perjurous statements against him and mainly in order to elicit evidence helpful in indicting him. Several decisions of this Court, such as *Orta, Daniels, Glasco, Stassi* and *Wilcox,*[1] have involved perjurous testimony and the adequacy of the instruction as to constitutional rights; however, the precise issue of a putative defendant who was primarily called before the grand jury for the purpose of obtaining incriminating or perjurous statements and mainly in order to elicit evidence helpful in indicting him has not been presented to this Court. Although there are factually overlapping features of the cases to be discussed, we have concluded that the totality of circumstances in the case at bar calls clearly for this Court to affirm the district court's suppression of Mandujano's testimony before the grand jury.

[2] As heinous as the crime of perjury is under our law, and as correct as the *Orta* principle is, that a witness uninformed of his constitutional rights generally should not be afforded a license to commit per-

[1] *United States* v. *Orta*, 253 F. 2d 312 (5th Cir. 1958); *United States* v. *Daniels*, 461 F. 2d 1076 (5th Cir. 1972); *United States* v. *Glasco*, 488 F. 2d 1068 (5th Cir. 1974); *Stassi* v. *United States*, 401 F. 2d 259 (5th Cir. 1968); *United States* v. *Wilcox*, 450 F. 2d 1131 (5th Cir. 1971).



jury, under our law, we simply cannot ignore the unfairness in baiting this defendant before the grand jury and overlook the principle that the Fifth Amendment must always be as broad as the mischief against which it seeks to guard. In order to deter the prosecuting officers from bringing a putative or virtual defendant before the grand jury, for the purpose of obtaining incriminating or perjurous testimony, the accused must be adequately apprised of his rights, or all of his testimony, incriminating and perjurous, will be suppressed. In order to combat these methods the Fifth Amendment privilege must be fully honored in this situation. This end entails only slight erosion of the general principle announced in *Orta*. This deviation in the situation of a putative defendant uninformed of his *Miranda* rights and called for the purpose of obtaining incriminating or perjurous testimony is necessary to counteract the fundamental unfairness of allowing a defendant to be faced by such a Hobson's choice.

In distinguishing *Orta,* we distinguish the other cases, cited above rendered after the date of *Miranda,* which reaffirmed the *Orta* principle (pre-*Miranda*), as none of these decisions concerned the situation of a putative defendant entitled to, but unadvised of, his *Miranda* warnings. The problem here is the problem adverted to in the *dictum* in *Orta,* and not the problem *adjudicated* by the *Orta* holding or by any other decisions of this Court. As previously indicated, the grand jury was not seeking to indict Orta and Orta was not a putative defendant, entitled to *Miranda* warnings. Orta was an ordinary witness entitled to a general Fifth Amendment warning.

The district court apparently determined that in view of the subsequent holding in *Miranda,* there was

now an essential difference between a *prosecution* for perjury when there have been no *Miranda* warnings and the *suppression of testimony* under the exclusionary rule, when such warnings have not been given, i.e., that although the indictment could not have been dismissed, the testimony could nonetheless have been suppressed. This distinction would be a facile solution to the difficult question here, were it not for the language in United States v. Glasco, 488 F.2d 1068 (5th Cir. 1974), intervening between the district court's decision in the case at bar and the instant appeal, indicating that *Orta* had "post-*Miranda* vitality." In *Glasco* the defendant *witness,* who was in custody for another crime, had perjured himself when testifying in the trial of another defendant and the court held that a motion to suppress was properly denied. Again, however, *Glasco* concerned entirely different facts, and an entirely different procedure. Glasco was not put up as a witness to give evidence incriminating himself. He had already pleaded guilty to the same offense. Here, the agent reported that he believed Mandujano had committed the narcotics offense charged in count 1, and the government proceeded to subpoena Mandujano before the grand jury and asked him the precise questions dealing with a transaction that led to his being indicted by this same grand jury. Moreover, since Glasco appeared at a trial as a defense witness, he apparently appeared voluntarily and not by the compulsion of a subpoena issued on behalf of the government.

Furthermore, the two cases cited in *Glasco, Wilcox* and *Stassi,* also involved factual circumstances so dissimilar from those of the instant case that they need not be discussed. Both cases quoted from the *Orta* opinion.



One final case, United States v. Daniels, 461 F. 2d 1076 (5th Cir. 1972), which was noted by the district court, discusses the applicability of *Orta* to persons who commit perjury before a grand jury. Grand jury witness Daniels signed a "Waiver of Privilege Against Self-Incrimination" which advised that a witness could consult with an attorney outside the grand jury room but contained no statement with respect to the appointment of counsel for indigent witnesses, and proceeded to give perjurious testimony to the grand jury. Daniels conceded that generally there is no right to counsel for ordinary witnesses appearing before the grand jury, but argued that when an indigent witness who is advised that he may have an attorney present, must also be advised that if he is unable to provide his own counsel, one will be appointed for him free of cost. Finding that Daniels was "only a witness" and "was not under indictment when he appeared," the court held that he was not entitled to appointed counsel. The important distinguishing factors are that Daniels did not argue that he was entitled to *Miranda* warnings, but only contended that since a witness could have retained counsel, he should have been advised that indigent witnesses may have appointed counsel free of cost. Furthermore, the court clearly delineated that Daniels was only a witness and not a putative defendant. Therefore, the latter portion of the decision which concludes that Daniels, even if entitled to counsel and deemed not to have waived his rights, would still have no license to perjury is a reaffirmation of the general principle announced in *Orta* and is to be distinguished completely from the situation of a putative defendant entitled to *Miranda* warnings who is called before the grand jury for the purpose of obtaining incriminating or perjurous testimony.

We reiterate that the *Orta* principle that witnesses uninformed of their constitutional rights should not be allowed a license to commit perjury continues with full force. We only make a slight inroad that where a totally unfair procedure is put in train—as when there is a factual determination that a person who is subpoenaed before the grand jury and questioned about an alleged crime, was already known to the satisfaction of the prosecuting agency prior to the grand jury appearance to be guilty of that precise crime—, elemental fairness requires that such a person is under such compulsion as to require that he be given the *Miranda* warnings, and that failure to do so must require suppression of any incriminating testimony given by him even though he is being prosecuted for giving false testimony.

The remaining question arises from the principle that the Fifth Amendment protection against self-incrimination extends only to past acts, not to those that are or may be committed in the future. As stated in Glickstein v. United States, 222 U.S. 139, 32 S. Ct. 71, 56 L. Ed. 128 (1952), [quoted by the *Orta* court, as stated *infra*], "* * * the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury." The appellant urges that when the defendant Mandujano appeared before the grand jury, he had not committed the perjury and that his criminal liability concurred with his utterance before the grand jury. Therefore, the perjury indictment was not premised upon evidence of past acts obtained from the mouth of the defendant, but was based on a crime whose very commission, rather than evidence of commission, was the defendant's testimony. Glickstein v. United States,



*supra,* concerned a bankrupt who was indicted for perjury for having falsely sworn in a bankruptcy proceeding while under examination before a referee.

Once again, we must point to the distinguishing characteristics in the facts and the *proceedings* in this case. The entire proceedings here which led up to Mandujano's indictment for perjury were, as we have noted repeatedly, beyond the *pale of permissible prosecutorial conduct.*[8] We conclude that the entire proceeding was a violation of Mandujano's due process rights under the Fifth Amendment.

We, of course, do not attempt an axiomatic definition of due process, but note the well known language from Betts v. Brady, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256, 86 L.Ed. 1595 (1941), overruled on other grounds, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1962):

> Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Although the application of the standard set in Betts v. Brady, *supra,* was overruled in Gideon v. Wain-

[8] As did the trial court, we refrain from placing blame on any one official for what turned out to be conduct "smacking" of entrapment. We recognize the fact that involved here were an agent who reported to his superior, and then a special attorney having designated duties in the field of narcotics investigation and prosecution, and finally the United States Attorney and his staff. Somewhere within this chain of command and information, a decision was made to subpoena as a witness a man to whom the original agent testified he had given $650 for a "score," and to ask this witness about this specific transaction.

wright, *supra,* it is clear that the test remains the same. Was the conduct (refusal to appoint counsel) so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process. 316 U.S. at 473.

We conclude simply that the proceedings here complained of met that standard.

We believe this not to be inconsistent with any prior decision of this Court, all of which dealt only with the specific rights guaranteed by the self-incrimination clause of the Fifth Amendment

The judgment is affirmed.

## APPENDIX B

United States Court of Appeals
for the Fifth Circuit

October Term, 1973

(No. 73-3353)

D.C. Docket No. CR SA 73 CR 163

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

ROY MANDUJANO, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Western District of Texas

Before TUTTLE, COLEMAN, and AINSWORTH, Circuit Judges.

### JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed.

JUNE 28, 1974.

Issued as mandate: October 24, 1974.
A true copy:

Test: EWARD W. WADSWORTH,
*Clerk, U.S. Court of Appeals, Fifth Circuit.*
By CLARE F. SACHS,
*Deputy.*

New Orleans, Louisiana

# APPENDIX C

United States Court of Appeals
for the Fifth Circuit

October Term, 1973

(No. 73-3353, 73-3356)

D.C. Docket No. CR SA 73 CR 163

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

RAY MANDUJANO, DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

PAUL GONZALES RANGEL, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Western District of Texas

Before TUTTLE, COLEMAN, and AINSWORTH, Circuit Judges.

ORDER

The petition for rehearing is denied, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Ap-

pellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc is denied.

Issued as mandate: October 16, 1974.

A true copy:

Test:

EDWARD W. WADSWORTH,
Clerk, U.S. Court of Appeals, Fifth Circuit.
By CLARE F. SACHS,
*Deputy.*

New Orleans, Louisiana.

U.S. GOVERNMENT PRINTING OFFICE: 1974

## APPENDIX D

United States District Court
Western District of Texas
San Antonio Division

[Filed September 21, 1973]

Criminal No. SA73CR164, SA73CR163

UNITED STATES OF AMERICA

*v.*

PAUL GONZALES RANGEL

UNITED STATES OF AMERICA

*v.*

ROY MANDUJANO

## OPINION

This matter involves the defendants' separate motions to suppress their testimony before the special grand jury which was convened on May 2, 1973. The two cases before the Court, though not consolidated, and not involving the same transaction, embody virtually identical sets of circumstances. Each defendant is charged in a two count indictment with an attempt to distribute heroin in the first count, and with perjury before the grand jury in the second count. The indictment for perjury in each case (count two) is based upon each defendant's denial before the grand jury of any attempt to sell heroin, or any solicitation to do so, while count one alleges that each defendant did in fact make just such an attempt to sell to drug

enforcement officials. Both alleged attempts took place prior to the defendants' grand jury appearances.

As to defendant Rangel, the indictment alleges that he attempted to distribute three ounces of heroin on or about the 8th day of December, 1972. The record reflects that a federal narcotic agent in December of 1972 attempted to purchase three ounces of heroin from him, and discussions about money for the supposed drugs took place, though no money ever changed hands.

With respect to the defendant, Mandujano, the indictment alleges that he attempted to distribute one ounce of heroin on or about the 29th of March, 1973. A different federal narcotic agent testified that in March of 1973 he made contact with Mandujano, and offered him money for the purchase of heroin, giving him $650 for the alleged attempted purchase.

Defendants maintain that the above interrogration by the special attorney for the Drug Enforcement Administration before the grand jury intentionally tracked the exact facts of the actual contact between federal narcotic agents and the defendants, and that the questions were asked as a continuing part of an investigation of the narcotics activities of the defendants.[1] The agents involved, and the government at-

[1] When the special attorney for the Drug Enforcement Administration questioned Rangel before the special grand jury, the following exchange took place:

Q. Have you ever offered to sell heroin, get heroin for someone?

A. No, sir.

Q. Let me ask you specifically have you at any time within the last four months, five months, since December 1st last year, the month Christmas was in, have you since then at any time sold any heroin to anyone——

A. No, sir, I haven't.



torney who appeared before the grand jury, testified that they had discussed the circumstances of the

Q. For money? Have you offered to sell heroin to anyone during that period?

A. (Nod negative.)

Q. Have you talked with anyone since December 1, 1972, about getting them some heroin——

A. No, sir.

Q. Or selling some heroin?

A. (Nod negative.)

Q. I want to make this clear to you. I think—in fact I know I told you at the the outset that we will ask you certain questions and if you make a statement, you are under oath and Mr. Tarbutton, the foreman of the grand jury, who asked you to raise your right hand tell the truth, the whole truth and nothing but the truth—We have asked you questions and if you have lied to us, in other words if you have made a false answer, false statement in response to some of these questions I have asked you, particularly those I have just asked you about heroin, having heroin, selling heroin or trying to get heroin to sell for somebody, if you made a false statement and we prove it is false, you have committed a felony, a federal felony. Do you understand that?

A. Yes, sir, I do.

Q. With that in mind do you still make the same answer to the questions I have asked you about the sale?

A. Yes, sir . . .

A member of the grand jury then asked:

Q. Let's go back just a little bit there, Mr. Rangel, back in December, four months ago, five months ago, December of 1972——

A. Yes, sir.

Q. Before Christmas a couple of weeks. Did you at any time offer to obtain some heroin for someone that came to see you?

A. No, sir.

Q. Your nickname is Payo?

A. Yes, sir.

Q. Are you sure about that?

A. Yes, sir.

(Continued)

attempted buys in preparation for the appearance of Rangel and Mandujano before the grand jury. Given

(Continued)

The defendant Mandujano was asked the following questions, among others:

Q. Have you ever talked with anybody about selling it? Has anybody tried to buy heroin from you? Have you tried to get heroin for them in order to sell to them?

A. No, sir.

Q. Are you sure of that?

A. Yes, sir.

Q. In other words, no one has ever come up to you and wanted to buy heroin?

A. No, sir.

Q. And you have never told anybody that you would try to get heroin to sell to them?

A. No, sir.

Q. Now, you can say here today that you have not discussed the sale of heroin with anybody in the last year.

A. I don't understand you, sir.

Q. Have you talked to anybody about selling heroin to them during the last year?

A. No, sir.

Q. You are sure about that?

A. I just, you know, I discuss it, you know, when we buy it, you know, to fix it just, you know.

Q. Has anyone ever asked you if they could buy an ounce of heroin or more from you?

A. No, sir.

Q. Let me ask you once again, Mr. Mandujano, have you ever talked to anybody about selling them heroin in the last year?

A. No, sir.

Q. No one has ever given you any money——

A. No.

Q. —to go buy them heroin?

A. No, sir . . .

Q. In other words, if you had $650 right now——

A. Yes, sir.

Q. —do you think you would be able to purchase an ounce of heroin?



the nature of the investigation and the questions asked before the grand jury, the defendants maintain, and this Court agrees, that full *Miranda* warnings should have been given to the two individuals who were in the position of "putative" or "virtual" defendants.

The government maintains that neither case was considered for presentation to the grand jury prior to the testimony of the defendants before that body, and that both files had been closed following the contact between the defendants and the law enforcement officers; nevertheless, the facts of the case belie the government's protestations of innocent intent with respect to the possibility of future prosecutions. The special attorney who had conducted the questioning testified that he was well aware of the previous contact with the defendants in attempts to buy from them, as well as the exact circumstances involved in each attempted buy. The transcript of the grand jury proceedings reveals deliberate and careful attention to questions which specifically delved into the facts concerning these contacts between the defendant(s) and government agents. The special attorney was aware that no case had been made, and though this Court does not presume any improper motives on the part of the government agents or the special attorney, it strains credulity to suggest that the special attorney did not have one eye on a possible prosecution of the defendants.[2] The government had in fact already attempted to make a case against each defendant. Note

[2] It seems more than coincidence that when the special attorney questioned defendant Mandujano about buying one ounce of heroin, he offhandedly mentioned the exact amount of money offered Mandujano by the special agent when that agent attempted to buy from Mandujano.

too that each defendant, immediately after denying any contact about an attempted sale, was asked in the very next question about the validity of that answer, and defendant Rangel was promptly cautioned again about the penalty for perjury. Considering the totality of the circumstances in this case, the questioning of the defendants before the grand jury smacks of entrapment. Moreover, given the fact that the investigatory files involving the attempts to buy from both defendants had been closed, the questions posed presented a high likelihood that the answers provided by the defendants would furnish material for further action on the part of the government. If the defendants admitted that they had offered to buy heroin for the undercover agent who approached them, the government could possibly have used such an admission in its case-in-chief in connection with the attempted sale. See *United States* v. *Leighton*, 265 F. Supp. 27 (S.D. N.Y. 1967), *cert. denied*, 390 U.S. 1025 (1968); *United States* v. *Montos*, 421 F. 2d 215 (5th Cir.), *cert. denied*, 397 U.S. 1072 (1970). The denial by defendants that they had conversations about procuring heroin for the officers left them open to the consequent indictments for perjury. Actually, therefore, their only safe harbor would have been to remain silent, and this option was, in effect, denied to them.

The fact that defendants may have subjected themselves to serious risk of prosecution for perjury, or for the substantive attempt to sell heroin, does not necessarily bar further use of their testimony. Certainly, if they had received full *Miranda* warnings during the initial phase of their appearance before the grand jury, but had continued to willingly testify, then their testimony would very likely have constituted a voluntary waiver of the right to remain silent. The Fifth Circuit has recently restated the well



recognized rule that "a potential defendant may be subpoenaed to appear before a grand jury and be subsequently indicted without violating the self incrimination proscription, if he testifies voluntarily." *United States* v. *Morado*, 454 F. 2d 167, 172 (5th Cir.), *cert. denied*, 406 U.S. 917 (1972).

This Court finds that neither defendant made a complete, knowing, and intelligent waiver of the right to remain silent, nor was either defendant properly apprised of that right, or of his right to appointed counsel outside the grand jury room. As to defendant Rangel, the statement of the right to remain silent was so garbled as to be highly suspect, especially in the context of the following complete excerpt from the transcript:

> Now anytime I ask you a question and you feel the answer would tend to incriminate you, you have a right to refuse to answer that question, but you can't refuse to answer a question if it is not—if the answer would not tend to incriminate you. In other words, you would be in contempt of court. Do you understand what I mean by incriminate you?

Besides the convolution of the double negative in the foregoing language, that warning, as administered to defendant Rangel, contains an implicit threat which all but negates the warning of the right to remain silent. The special attorney examining the defendant did not suggest to Rangel that he *could* be held in contempt, if he wrongly refused to answer. Instead he told the defendant that he *would* be held in contempt, if he made the wrong guess as to the incriminating nature of an answer. The explanation by the special attorney thus carried a strong implication that any doubt as to the incriminating nature of a response should be resolved by the defendant in favor of an-

swering, instead of in favor of silence. Judgments about the actual incriminating nature of a statement present great difficulties even for attorneys well versed in the law, so, as a general rule, they advise clients to opt for silence whenever any doubt exists. It is certainly unrealistic, as well as unfair, to require a putative defendant, who is not learned in the law, to choose between "incriminating" and "non-incriminating" answers, especially in the somewhat imposing environment of the grand jury room, unless he has been fully, completely and unambiguously advised of his right to remain silent, and voluntarily waives that right.

This Court has equal difficulties with the warning given defendant Mandujano:

> Q. "Now you are required to answer all the questions that I ask you except for the ones that you feel would tend to incriminate you. Do you understand that?
>
> A. Do I answer all the questions you ask?
>
> Q. You have to answer all the questions except for those you think will incriminate you in the commission of a crime. Is that clear?
>
> A. Yes, sir.
>
> Q. You don't have to answer questions which would incriminate you. All other questions you have to answer openly and truthfully. And, of course, if you do not answer those truthfully, in other words if you lie about certain questions, you could possibly be charged with perjury.

Here the questioning attorney stressed not the right to remain silent, but the requirement that the defendant answer all of the questions put to him, with limited exceptions. He did not stress the alternative of the defendant remaining silent in the face of a potentially damaging question, but instead stressed the penalty for perjury. As the Supreme Court said in



*Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), "'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights."

The government has argued strenuously that witnesses before the grand jury are entitled to no *Miranda* warning whatsoever, *United States* v. *DiMichele*, 375 F. 2d 959 (3rd Cir.), *cert. denied*, 389 U.S. 838 (1967); *United States* v. *Orta*, 253 F. 2d 312 (5th Cir.), *cert. denied*, 357 U.S. 905 (1958); *United States* v. *Scully*, 225 F. 2d 113, 116 (2nd Cir.), *cert. denied*, 350 U.S. 897 (1955); *United States* v. *Wolfson*, 294 F. Supp. 267 (D. Del. 1968), but the defendants in the instant case were not ordinary "witnesses" when they entered the grand jury room.

It is significant that in many cases upholding indictments brought subsequent to appearances before grand juries, the defendants were clearly warned of their right to remain silent and their right to counsel. *United States* v. *DiMichele, supra,* held only that *Miranda* warnings were not required in the grand jury room itself, especially in light of the fact that the defendant had already been "fully advised of his right to remain silent and to counsel."[3] Most cases where grand jury testimony has been challenged as violative of witnesses' Fifth and Sixth Amendment rights have involved clear and complete warnings on the part of the government prosecutor. In *United States* v. *Corallo*, 413 F.2d 1306, 1329 (2nd Cir.), *cert. denied*, 396 U.S. 958 (1969), the warning given stressed the right to refuse to "answer any questions the grand jury may ask you today, the answers to which you feel . . . tend to incriminate you personally." This is unlike the present case in which the warning stressed instead the compulsion to testify.

---

[3] 375 F. 2d at 960.

In addition, the witness in *Corallo* was cautioned that if the questions were answered, they might be used against him in a court of law. In all fairness, this Court believes that such a warning would have been not only instructive, but highly appropriate in the circumstances of this case. In *United States* v. *Potash,* 332 F. Supp. 730 (S.D. N.Y. 1971), the witness was warned that he had an absolute right under the Fifth Amendment to refuse to answer incriminating questions, and "if you cannot afford an attorney, you have the right to have an attorney appointed free of charge, to remain outside the grand jury room and you may consult with him prior to answering any of my questions."[4]

The Sixth Circuit has clearly held that when a witness before a grand jury is "virtually in the position of a defendant", then he must be advised of his right to refuse to answer incriminating questions, and that anything he says may be used against him. *United States* v. *Luxenberg,* 374 F. 2d 241 (6th Cir. 1967). In *United States* v. *Fruchtman,* 282 F. Supp. 534 (N.D. Ohio 1968), *cert. denied,* 400 U.S. 849 (1970), the Court explored the meaning of the "virtual defendant" language, and, in circumstances very similar to the instant case, found the witness to be a virtual defendant. In *Fruchtman* the government attorney submitted an affidavit denying that the witness was a potential defendant at the time of questioning. Yet the Court noted that the same attorney had read investigative reports detailing the circumstances about which the witness was questioned before the grand jury. These facts are very similar to those in the in-

[4] 332 F. Supp. at 733 n.3 (1971). *See also United States* v. *Irwin,* 354 F. 2d 192, 199 (2nd Cir. 1965), *cert. denied,* 383 U.S. 967 (1966); *United States* v. *DiGiovanni,* 397 F.2d 409 (7th Cir.), *cert. denied,* 393 U.S. 924 (1968).



stant case, where the special government attorney read the narcotics agents' reports prior to the grand jury session.[5]

Although the Fifth Circuit has not expressly dealt with the full scope of *Miranda* in the context of grand jury investigations, *Mattox* v. *Carson,* 424 F. 2d 202 (5th Cir.), *cert. denied,* 400 U.S. 822 (1970), it did examine the problem to some extent in *United States* v. *Morado,* 454 F. 2d 167 (5th Cir.), *cert. denied,* 406 U.S. 917 (1972), where, without indicating whether it would agree with the "virtual defendant" concept, noted the Sixth Circuit's emphasis upon "the same factor we have considered to be of prime importance in determining whether or not a man is 'in custody', as that term is used in *Miranda:* has the 'focus' of the investigation centered upon him?"[6] The Court then indicated its sympathy with the idea that if the investigation had passed beyond the stage of a general inquiry into an unsolved crime or a suspected conspiracy, and had focused upon the defendant as someone whom the government planned to indict, and against whom it was gathering incriminating evidence, then the defendant would be in the position of the "virtual defendant". This Court finds the lan-

[5] "Although the Government contends that it did not at the outset intend to obtain an indictment against defendant as a result of his testimony, it does not appear that the examination would have been conducted any differently if it had * * * [A] man's rights do not depend on the subjective intent of the prosecutor, nor upon the prosecutor's knowledge as to what acts, if committed, might constitute an offense under the law." 282 F. Supp. at 536 (1968).

[6] Many courts have found that grand jury investigations of witnesses who later became defendants were not custodial interrogations. See *e.g., United States* v. *Morado,* 454 F. 2d 167, 173 (5th Cir.), *cert. denied,* 406 U.S. 917 (1972); *United States* v. *McGinnis,* 344 F. Supp. 89 (S.D. Tex. 1972).

guage of the Fifth Circuit in *Morado* especially applicable in the instant case, where there was no basis (other than hope) for the perjury count of the indictment until after the grand jury appearance. The fact that the questioning attorney immediately pounced upon each defendant's denial that he had been contacted about sales of heroin, indicated a clear and direct focus upon Rangel and Mandujano as future defendants.

Under the circumstances of this case, this Court finds that Rangel and Mandujano were putative defendants as outlined in the "virtual defendant" rule of the Sixth Circuit, and holds that both witnesses had a right to be warned of their right to remain silent in regard to any question which might tend to incriminate them; that any testimony given might be used against them in a court of law; and that if either of them wanted an appointed attorney he had a right to have one available to him for consultation outside the grand jury room.[7]

[7] Actually, Mandujano told the special attorney that he didn't have the money to get a lawyer. The exchange during the grand jury proceedings between Mr. Mandujano and the questioning special attorney included the following:

Q. Have you discussed your presence here with anybody?

A. My wife.

Q. Have you contacted a lawyer in this matter?

A. No sir, I haven't.

Q. I take that to mean then that you do not wish the services of a lawyer here today?

A. I don't have one. I don't have the money to get one.

Q. Well, if you would like to have a lawyer, he cannot be inside this room. He can only be outside. You would be free to consult with him if you so chose. Now, if during the course of this investigation, the questions that we ask you, if you feel like you would like to have a lawyer outside to talk to, let me know.

A. Yes, sir.



This Court agrees with the argument that as a matter of policy a *de jure* or *de facto* defendant should never be called before a grand jury, unless, of course,

Q. Is that clear?

A. (Nod affirmative).

Mr. Rangel was asked the following questions:

Q. You are not under arrest.

A. I know, sir.

Q. You know that. As far as I know there are no warrants out for your arrest. You have a right to an attorney if you want one. Do you have an attorney?

A. He didn't tell me anything. They just gave me the subpoena.

Q. No. I say, did you talk to an attorney after you got the paper, the subpoena?

A. No, sir. I didn't.

Q. You have the right to an attorney if you want one. He can't be in here with you. The rules wouldn't permit it, but he could be outside and you could talk to him anytime you want to.

At no time was either defendant told that an attorney would be furnished him free of charge if he was financially unable to employ one. This Court finds the words of the Fifth Circuit in *Irving* v. *Breazeale*, 400 F.2d 231, 235 (1968) especially telling in this regard: "An accused cannot be found to have waived a right if he was not aware that he had it. Thus it is not sufficient merely to ask an indigent defendant whether he wants a lawyer. If he is unaware that counsel will be appointed whether he can afford to pay or not, he will not likely say that he wants a lawyer even if he thinks he needs one."

It should be noted that a Criminal Justice Act Guideline Approved by the Judicial Conference of the United States in September 1973 provides:

> "When a judge appoints counsel for a witness before a grand jury under the terms of the Criminal Justice Act in cases in which the witness faces loss of liberty, such appointment shall be deemed to be an appointment under the general terms of the Act rather than under the terms of subsection (g) and that ordinarily such appointment should be considered to be an appointment in a misdemeanor case."

he volunteers to testify.[8] But if a defandant or putative defendant is called to appear before the grand jury, the very least that should be accorded him is a full and complete recitation of his constitutional rights in order to make certain that if he does testify his testimony will have been given knowingly, voluntarily and intelligently.

This Court does not suggest that every *witness* before a grand jury has a *right* to appointed counsel present outside the grand jury room,[9] but when an indigent witness requests that counsel be appointed to assist him, it may be a wise policy to comply with such request.[10] However, in the case of a virtual or putative defendant, the exercise of proper judgment as to the incriminating effect of any answers before the grand jury becomes doubly important. In such a case the right to counsel would be an empty one indeed if those capable of retaining a private attorney could consult with them outside the grand jury room, but those unable to pay, but equally subject to the penalties of the criminal law, could not.

Both incriminating testimony and testimony later

[8] "Indeed, one would suppose that, as a matter of ethics or fair play or policy, a prosecutor would in all cases refrain from calling as a witness before a grand jury any person who is *de jure* or *de facto* an accused. The absence of appeals to this Court involving the problem under discussion would seem to indicate that some such rule or practice is observed in the prosecutors' offices in this circuit." *United States* v. *Scully*, 225 F.2d 113, 116 (2nd Cir.), *cert. denied*, 350 U.S. 897 (1955). *See also United States* v. *Messitte*, 324 F. Supp. 334, 338 (S.D.N.Y. 1971).

[9] See *United States* v. *Daniels*, 461 F. 2d 1076 (5th Cir. 1972); *United States* v. *DeSapio*, 229 F. Supp. 436, 440 (S.D.N.Y. 1969).

[10] *See generally* Right to Counsel Before Grand Jury, 41 F.R.D. 189 (1966).



proved to be perjurous have been upheld as admissible when a defendant has been fully advised of his constitutional rights. *United States* v. *Potash*, 332 F. Supp. 730, 732 (S.D.N.Y. 1971), *United States* v. *DiGiovanni*, 397 F. 2d 409, 412 (7th Cir.), *cert. denied*, 393 U.S. 924 (1968). There is no appreciable difference between the suppression of incriminating substantive evidence given before a grand jury in the absence of warnings, and the suppression of perjurious testimony given under the same circumstances. The Fifth Circuit, eight years before *Miranda*, stated that "under no circumstances, however, could [a witness] commit perjury and successfully claim that the Constitution afforded him protection from prosecution for that crime." *United States* v. *Orta*, 253 F. 2d 312, 314 (5th Cir.), *cert. denied*, 357 U.S. 905 (1958),[11] and *United States* v. *Daniels*, 461 F. 2d 1076, 1077 (5th Cir. 1972). But in view of the subsequent holding in *Miranda*, there is an essential difference now between a *prosecution* for perjury, when there have been no *Miranda* warnings, and the suppression of testimony under the exclusionary rule, when such warnings have not been given. This crucial difference between the dismissal of an indictment and the suppression of testimony, which otherwise might be

[11] In *Orta* the Court appeared to make a distinction between the consequences of a witness (unwarned of his right to remain silent) choosing to testify falsely rather than in a truthful though incriminating manner. The Court held that the Fifth Amendment would protect the witness from the truthful, incriminating statement, but if the witness testified perjurously, then the Fifth Amendment would offer no protection: "As said in *Glickstein* v. *United States*, 1911, 222 U.S. 139, 142. . . . '* * * the immunity afforded by the constitutional guaranty relates to the past, and does not endow the person who testifies with a license to commit perjury.'"

utilized in a prosecution, has been noted by the courts in different contexts many times.[12] In short, the proper remedy for testimony acquired in the absence of *Miranda* warnings is the suppression of the testimony and not the dismissal of the indictment.

One obvious purpose of *Miranda* was to avoid putting a defendant to the Hobson's choice of either incriminating himself or lying. In the case of the putative defendant who has not been properly warned of his rights, the only choice available to him apparently lies between incriminating himself or giving false testimony. *Miranda* would be vitiated if the government, by failing to give the warnings, could force the witness to guess as to which type of testimony is properly protected under the Fifth Amendment. In that event, an incorrect guess by such a witness would clearly constitute a situation in which he would have been "compelled to be a witness against himself."

While this Court agrees that the issuance of a subpoena to appear before a grand jury is not inherently coercive, *United States* v. *Cleary*, 265 F. 2d 459 (2nd Cir. 1959), it is quite obvious here that the defendants may very well have perceived themselves under an apparent compulsion to testify, a situation which falls within the ambit of custodial interrogation by virtue of the investigation having focused on them,[13] thus depriving them of "freedom of action in [a] significant way."[14]

---

[12] See, *e.g.*, *United States* v. *Blue*, 384 U.S. 251, 255 (1966); *Mattox* v. *Carson*, 424 F. 2d 202 (5th Cir.), *cert. denied*, 400 U.S. 822 (1970); *United States* v. *Wolfson*, 294 F. Supp. 267, 275 (D. Del. 1968).

[13] *Escobedo* v. *Illinois*, 378 U.S. 478, 485, 492 (1964).

[14] *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966).



As was pointed out in the case of *In Re Kelly*, 350 F. Supp. 1198 (E.D. Ark. 1972), courts cannot legitimately and fairly distinguish the appearance of some witnesses before the grand jury from the appearance of others based merely upon the expressed subjective intent of government attorneys. Long after presentment, and a grand jury vote upon an indictment, it becomes extremely difficult for even the most attentive attorney to recall exactly that moment when his view toward an individual changed from the impartial questioning of a witness to the sharp inquisitorial search directed toward a prospective defendant. See also *United States* v. *Kreps*, 349 F. Supp. 1049 (W.D. Wis. 1972).

If decisions as to the rights to be afforded an individual turned strictly upon the exact time of indictment, or presentment, of a case to a grand jury, or commencement of an investigatory file, simple delay of time of indictment would subvert *Miranda* to the point where it would be meaningless. When it is clear that an individual is being questioned with an eye to possible prosecution, and when an investigation has narrowed to close inquiry concerning that individual's behavior, as distinguished from his knowledge of activities performed by others, then that individual should be fully and carefully advised of his rights.

As a practical matter, this Court does not see that any undue burden would be placed upon the functions of the grand jury if *every* witness were fully advised as to the *Miranda* rights. Many witnesses enter the grand jury room already knowing the importance and meaning of the right to remain silent. For them, a *Miranda* warning does not impede the investigatory process in the least. And those who enter the grand jury room without such knowledge of their rights have no less right to remain silent with respect to

matters which might tend to incriminate them, or to consult counsel than their more informed counterparts; and pursuant to the concept of "equal justice under law", the government has no valid right to expect, as a matter of course, to be allowed to take advantage of the status of the less informed as an aid in its investigation and prosecution.

Considering all of the facts surrounding the appearance of Roy Mandujano and Paul Gonzales Rangel before the May 1972 special grand jury, this Court finds and ORDERS that their testimony before said grand jury be and the same is hereby suppressed.

Entered the 21st day of September, 1973.

ADRIAN A. SPEARS,
*United States District Judge.*

U. S. GOVERNMENT PRINTING OFFICE: 1974